STRAITS SETTLEMENTS REPORTS.

LEE POH LIAN NEO AND 2 OTHERS vs. THE CHINESE BANKERS TRUST CO. LTD.

[Orig. Civil Jurisdiction (Terrell, J.A.) March 6, 1941]

Trusts — Settlement executed by some of parties after death of others — Whether resulting trust arises on ground that settlement had never taken effect — Failure of objects of trusts — Whether adopted children included in trust.

One Wee Siang Tat died intestate on the 14th March 1901, possessed of certain lands, on a portion of which there were some family graves. On his death this estate was divided between his widow Ho Sok Choo Neo, his mother Ang Cheng Ann Neo, his sister Wee Suat Choo Neo, and the children of another sister Wee Suat Kim Neo who predeceased Wee Siang Tat. By an Indenture dated the 4th March 1922, Ang Cheng Ann Neo, Wee Suat Choo Neo and the four children of Wee Guat Kim Neo conveyed and released to Ho Sok Neo their beneficial interests in the land subject to the trusts thereinafter declared. The deed provided as follows:—

> "And the said Ho Sok Choo Neo hereby declares that she will henceforth stand possessed of the hereditaments upon trust during the lives of Wee Eng Cheng and Wee Eng Wan and the life of the survivor of them and for the period of twenty-one years after the death of the last survivor of them to permit the said land to be used as a burial ground for the family of the said Wee Siang Tat deceased who according to Chinese custom are entitled to be buried in the family burial ground. And upon further trust until the expiration of the said period to receive the rents and profits of the said land and after payment thereout of all outgoings and costs of collecting to apply the net income in the upkeep of the graves upon the said land and generally in or about the maintenance of the said land and to pay the residue of the net income to the person for the time being in charge of the tablets of the ancestors of the late Wee Siang Tat."

The present trustees of the Settlement are the defendants who were so appointed by Order of Court in 1940. The plaintiffs are the children of Wee Guat Kim Neo.

The plaintiffs claimed a declaration that there was a resulting trust in favour of the next of kin of Wee Siang Tat (deceased) in respect of the property subject to the trusts of the Indenture on the ground that the Indenture had never taken effect because at the date thereof one of the settlors Ang Cheng Ann Neo was dead. It was proved that at the time of the death of Ang Cheng Ann Neo, some of the settlors had not yet executed the deed. The plaintiffs also claimed a declaration that the trusts had become inoperative as (a) owing to the provisions of the Municipal Ordinance, Section 262, no further burials could take place on the land in question and (b) there were no legitimate descendant of Wee Siang Tat and therefore there were no persons in whose favour the trusts were declared who were capable of benefiting thereunder.

Held (1) that if there was any condition when Ang Cheng Ann Neo delivered the deed that the other parties should execute it that condition has been fulfilled and that therefore the deed was prima facie binding upon all the settlors and their respective estates;

(2) that on the facts six more graves could lawfully be created on part of the settled land without contravening Municipal regulations;

(3) that the trust in this case was clearly for the benefit of Wee Siang Tat's adopted sons and their issue or descendants and as there was no evidence that there was no such issue or descendants, the objects of the trust have not inevitably failed.

Cases referred to:—

(1) *Peto v. Peto*, 16 Sim. 590.
(2) *Bolitho v. Hillyar*, 34 Beav. 180.
(3) *Taylor v. Cartwright*, L.R. 14 Eq. p. 167.
(4) *Whitmore-Searle v. Whitmore-Searle* (1907) 2 Ch. 332.
(5) *Cheok Chin Huat and others v. Cheok Chin Soon* (1937) S.S.L.R. 103; (1937) M.L.J. 157.
(6) *In re Tan Cheng Siong deceased* (1937) S.S.L.R. 290; (1937) M.L.J. 87.

N. A. Mallal for the plaintiffs.

R. C. H. Lim for the defendants.

John Laycock for the trustees of Ho Sock Choo Neo (deceased).

Terrell, J.A.—One Wee Siang Tat died intestate on the 14th March 1901, possessed of certain lands in the District of Toah Payoh, Singapore, on a portion of which there were some family graves. On his death his estate was divided between his widow Ho Sok Choo Neo, his mother Ang Cheng Ann Neo, his sister Wee Guat Choo Neo, and the children of another sister Wee Guat Kin Neo who predeceased Wee Siang Tat. These children are the plaintiffs and one Lee Pang Seng, who has since died an undischarged bankrupt.

By an Indenture dated the 4th March 1922, Ang Cheng Ang Neo, Wee Guat Choo Neo and the four children of Wee Guat Kim Neo conveyed and released to Ho Sok Choo Neo their beneficial interests in the land at Toah Payoh (more particularly described in the schedule thereto) subject to the trusts therein after declared. The deed proceeded as follows:—

> "And the said Ho Sok Choo Neo hereby declares that she will henceforth stand possessed of the hereditaments upon trust during the lives of Wee Eng Cheng and Wee Eng Wan and the life of the survivor of them and for the period of twenty-one years after the death of the last survivor of them to permit the said land to be used as a burial ground for the family of the said Wee Siang Tat deceased or any issue or descendant of the said Wee Siang Tat deceased who according to Chinese custom are entitled to be buried in the family burial ground. And upon further trust until the expiration of the said period to receive the rents and profits of the said land and after payment thereout of all outgoings and costs of collecting to apply the net income in the upkeep of the graves upon the said land and generally in or about the maintenance or improvement of the said land and to pay the residue of the net income to the person for the time being in charge of the tablets of the ancestors of the late Wee Siang Tat."

The present trustees of the Indenture are the defendants who were so appointed by an order of

Court dated the 19th February 1940, and made in Originating Summons No. 11 of 1940.

Both Ang Cheng Ann Neo and Ho Sok Choo Neo are now dead, and by an order made herein on the 8th April 1940 it was ordered that John Laycock, Chua Tiang Cheng and K. S. Oon the present trustees of the will of Ho Sok Choo Neo deceased, should represent the interests of the estates of Ang Cheng Ann Neo deceased and of Lee Pang Seng deceased, and the interests of all other persons except the plaintiffs beneficially interested in the land comprised in the Indenture or settlement. I take it that they do not, by virtue of this order, represent the interests of the persons (if any) beneficially entitled under the settlement, but such interests are sufficiently represented by the trustees of the settlement who oppose the relief claimed by the plaintiffs and the other settlors.

On the 3rd February 1941 the trustees of the will of Ang Cheng Ann Neo applied for liberty to attend the proceedings. The summons was heard before me on the 17th February 1941. As in my opinion the interests of the estate of Ang Cheng Ann Neo deceased were already sufficiently represented by the previous order of the 8th April 1940, I ordered that the applicants be at liberty to attend the proceedings at their own expense. This order has not yet been drawn up.

The plaintiffs claim (1) a declaration that there is a resulting trust in favour of the next-of-kin of Wee Siang Tat deceased (therein described as the settlors) in respect of the property which is subject to the trusts of the Indenture. Prayer (2) is for a declaration that the trusts have become inoperative. Prayer (4) is for an enquiry as to whether the defendants have a good title to all the property described in the Schedule to the Indenture and for necessary directions.

Prayer (1) does not state the grounds upon which it is alleged that a resulting trust has arisen, but it was argued before me that the Indenture had never taken effect because at the date thereof, namely the 4th day of March 1922, one of the settlors, Ang Cheng Ann Neo, was dead.

I will first deal with this argument. It appears on the face of the original Indenture that it was prepared in 1911 by the firm of Messrs. Rodyk & Davidson (Ho Sok Choo Neo's solicitors), and was executed by Ang Cheng Ann Neo and possibly by some, but certainly not by all, of the other parties to the Indenture. Ang Cheng Ann Neo executed the Indenture in the presence of the late Mr. Van Someren, and there is a certificate that she appeared before him on the 27th February 1911, and made the usual acknowledgment. The Certificates in the case of the other signatories are dated the 24th, 25th and 27th February 1922 and the 3rd and 4th March 1922, and the latter is the date of the instrument. There are two alterations in the deed, the date being altered to one thousand nine hundred and twenty-two, by striking out "eleven" and substituting "twenty-two." There was a further alteration in that Ho Sok Choo Neo is described as "the widow of Tan Moeng Tho deceased" instead of as "the wife of Tan Moeng Tho", which was the correct description in 1911. The alterations are initialled by all the parties except Ang Cheng Ann Neo who was dead, and also by Sir Ong Siang Song who signed the other certificates of execution. It was argued that Ang Cheng Ann Neo's estate was released from the deed by the alterations made subsequent to her execution thereof, but in my opinion these are not material alterations, and do not affect the right or obligations of any of the parties (see *Norton on Deeds*, 2nd Ed. p. 46).

A more serious objection is the argument that Ang Cheng Ann Neo must have executed the deed on the condition that the other settlors would execute it, that at the time of her death some of them, either from incapacity or other cause, had not so executed it, and that accordingly the deed was not binding on her estate.

It has been laid down in the text books that the non-execution of a deed by parties whose execution was contemplated would relieve the parties executing from their obligations. It has become customary, therefore, in the case of a release to trustees, where some of the beneficiaries are infants, to make them parties with a view to their executing the deed on their attaining their respective majorities if they think fit, and to provide that the deed shall be binding on the adult parties who have executed it, whether the infant parties subsequently execute it or not (see *Key & Elphinstone*, 12th Ed. Vol. II, p. 478). This rule is based on *Peto v. Peto*[1], where a deed of family arrangement was prepared containing mutual covenants by the eight children of A. One of the children was in India at the time and never executed the deed, and it was held that the deed was not binding on the parties that had executed it. This case was followed in *Bolitho v. Hillyar*[2]. In that case a deed relating to reversionary interests in a fund was executed by some married women and their husbands. One of the married women survived her husband who died before the interest fell into possession. In such a case a confirming deed was required, and no such deed was ever executed. After her death it was held

that the deed was not binding on her estate, and from this it followed that it was not binding on any of the other parties to it.

Where, however, it is not a necessary inference that execution by all the parties was contemplated, a deed may be binding on parties who executed it, even though it is not binding on other parties who were under an incapacity. For instance, in *Taylor v. Cartwright*[3] a testatrix bequeathed a fourth of her residue to each of her four children, the share of a married daughter being bequeathed in trust for her life for her separate use without power of anticipation. By a subsequent deed of family arrangement certain securities were appropriated for each share and in calculating the amounts to be allocated, both the married daughter and one of the sons allowed a deduction of £400 each in respect of advances made to them during the life of the testatrix. The children of the married daughter later filed a bill in Chancery to compel the legal personal representatives of the original trustees to pay the amount previously deducted, and they were held entitled to succeed on the ground that the consent of a married woman who was tenant for life without power of anticipation could not bind her children who were entitled to the capital in remainder. Wickens V. C. held that the son was nevertheless bound by his consent given in the same deed, and says:—

> "On the face of the transaction the adult male's act was not made conditional on the submission by the unrepresented parties to what their mother purported to do on their behalf; and I cannot infer that one was conditional on the other without even a suggestion in the pleadings that it was so."

These considerations do not really arise in the case how before the Court, as, if the execution by Ang Cheng Ann Neo was in fact conditional on its execution by the other parties, such condition has been fulfilled.

An authority more relevant to the facts of the present case is *Whitmore-Searle v. Whitmore-Searle*[4]. In that case certain freehold hereditaments were held under strict settlement. The tenant for life had had three children, and the eldest son William Whitmore-Searle, shortly after attaining 21, executed a disentailing assurance. Under the Fines and Recoveries Act of 1833 the deed required the assent of the tenant for life who was the protector of the settlement. The deed was executed by the son in India on October 25th 1906, and was not received back until the 10th November 1906. On the 19th November 1906 the consent of the tenant for life was testified by his execution of the deed, but in the meantime on the 3rd November 1906, William had died. Kekewich J. says:—

> "Can it matter that he signifies his consent at a date later than the execution by the tenant in tail? A deed may be executed by several persons at different times, and the date of the execution—the date which is to be attributed to the deed—is in some cases a matter of importance. If there is nothing to contradict it, the date inserted is taken to be the date of actual execution, but it is common knowledge that a deed cannot always be executed, and very seldom is executed, by several parties at the same time."

The fact, therefore, that the protector of the settlement had not testified his consent until after the death of the tenant in tail was held not to invalidate the latter's execution.

A deed takes effect from delivery and not from its date (*Norton on Deeds*, 2nd Ed., p. 189) and evidence is admissible to prove the true date, i.e. the date of delivery (see p. 190). Where there are several grantors there may be more than one delivery, and there may even be a double delivery by the same person when the first delivery is through incapacity of the grantor void and of no effect (*Sheppards Touchstone*, p. 60), or in the case of an escrow (p. 72). In the case now before the Court the deed can be presumed to have been delivered by Ang Cheng Ann Neo on the 27th February 1911 when she acknowledged it. If there was any condition that the other parties should execute it that condition has been fulfilled. The deed, therefore, is *prima facie* binding upon all the settlors and their respective estates.

The next submission that was argued was that in the events that have happened the trusts have become incapable of execution and inoperative. The relevant trusts have been set out above.

Now Wee Siang Tat died intestate on the 14th March 1901. In 1904 an originating summons was filed by Ho Sok Choo Neo, his widow and administratrix (Originating Summons 4 of 1904) which resulted in an order by Hyndman Jones J. dated 9th May 1904, declaring who were the next-of-kin of Wee Siang Tat deceased. This order involved a finding that Wee Siang Tat left no legitimate children. According to the affidavit of Mr. Laycock filed herein on the 20th May 1940, he is able to depose from information given to him by Ho Sok Choo Neo during her life that Wee Eng Cheng, who is referred to in the settlement, was either a natural or adopted child of Wee Siang Tat, and that there were two other adopted children, Wee Eng Wan, also referred to in

the settlement, and Wee Boo Lat. Each of the last two named have endeavoured unsuccessfully in the last few years to establish that they were legitimate children. Wee Eng Cheng died on the 8th May 1928. I was informed at the Bar that he left no issue and that he is buried elsewhere than on the land comprised in the settlement. Wee Boo Lat being a daughter has married out of the family and is not concerned. Wee Eng Wan is a Christian. He is still alive but is not a party to these proceedings. It is stated that as a Christian he does not wish to be buried in the land in question. I accept the above facts so far as they go, but would point out that except for the date of Wee Eng Cheng's death, there is no evidence on affidavit to support them.

The argument that the trusts have failed was as follows:—

(a) That owing to the provisions of the Municipal Ordinance section 262, no further burials can take place on the land in question; and

(b) That there are no persons in whose favour the trusts were declared who are capable of benefiting thereunder.

As regards (a), Wee Siang Tat during his life obtained a licence to put six more graves on Titles 66, 75 and 83 having an area of $\begin{matrix}\text{a. r. p.}\\ 9.\ 2.\ 07.\end{matrix}$ These are a part of the settled lands. Wee Siang Tat was buried himself on another part of the land which had a licence for the burial of the family of his uncle Wee Boon Seng. This licence is dated the 21st December 1899 and is unlimited in respect of numbers. I do not think that this latter licence affects the contruction of the settlement which is expressed to be for the benefit of the family of Wee Siang Tat. It is however clear that six more graves can lawfully be created on part of the settled land without contravening Municipal regulations, and accordingly the first argument fails.

As regards (b), it is argued that the only objects of the trust were Wee Siang Tat's legitimate descendants and that, as it is known that he had none, the trusts have failed. Reliance is placed on the decision of Howes J. in *Cheok Chin Huat & others v. Cheok Chin Soon & Others*[5]. In that case a testatrix by her will devised a house upon trust to permit the same to be used as a family house by certain named beneficiaries and their families. The learned Judge held that 'family' must be given the primary meaning which it would be given in England and could not extend to include adopted children. In giving this decision the learned Judge referred to the decision of McElwaine C.J. in *In re Tan Cheng Siong deceased*[6], in which, in construing the will of a Chinese testator, the learned Chief Justice held that the children of the testator's paternal uncles in China must mean the legitimate children of the maternal and lawful brothers of the testator. The following passage occurs in the judgment:—

> "This ground of my decision only covers the case where ordinary words of relationship are used without anything in the will to indicate that the words are not used in their ordinary sense."

With this decision I respectfully agree. As regards the decision of Howes J., I am not satisfied that there was not material on the face of the will itself to indicate that the word 'family' was not used in its primary sense. However that may be, the trusts of the settlement differ very materially from the trusts of the will before Howes J. and the decision in *Cheok Chin Huat's* case affords little assistance.

In the settlement the trusts are "for the family of the said Wee Siang Tat deceased or any issue or descendant of the said Wee Siang Tat deceased who according to Chinese custom are entitled to be buried in the family burial ground."

It is argued that the word 'family' cannot be given a meaning wider than 'issue or descendants'. If that argument is correct, the words at the end are redundant, as it is obvious that when a trust is created for the burial of a man's issue or descendants, such issue and descendants are entitled to be buried there whether or not there is a Chinese custom affecting the matter. In my opinion therefore the concluding words extend the primary meaning of the word 'family'.

There is a further consideration. The trust is not created by Wee Siang Tat himself who might have legitimate descendants. On the contrary the trust was created by his widow and his next-of-kin ten years after Wee Siang Tat's death when they well knew that there were no such legitimate descendants. I do not require any authority for the proposition that adopted sons are just as efficacious for the purpose of ancestral ceremonies as legitimate sons. This custom has been recognised in many reported cases. I feel no doubt, therefore, that the trust was for the benefit of Wee Siang Tat's adopted sons Wee Eng Cheng and Wee Eng Wan and their issue or descendants. There is no evidence before me that Wee Eng Cheng had

no children. Wee Eng Wan is alive. There is no evidence whether he had or had not any children, and in any case he may have children. In my opinion, therefore, the objects of the trust have not inevitably failed.

It is, however, argued further that as the licence granted to Wee Siang Tat only covered an area of nine acres, there must be a failure of the trusts as regards the remainder of the settled property. There are however further trusts which have been set out above and which it will be convenient to repeat:—

> "And upon further trust until the expiration of the said period to receive the rents and profits of the said land and after payment thereout of all outgoings and costs of collecting to apply the net income in the upkeep of the graves upon the said land and to pay the residue of the net income to the person for the time being in charge of the tablets of the ancestors of the late Wee Siang Tat."

It will be noticed that the reference is not to the tablets of Wee Siang Tat, but to the tablets of the ancestors of Wee Siang Tat. It might be argued from this that the word 'family' in the preceding clause might have a still wider meaning and include the descendants of such ancestors, and that accordingly collaterals of the Seh name of 'Wee' are also objects of the trust for burial. It is however not necessary to decide this point, since on my finding that 'family' anyway includes adopted sons, there is still a possibility of the trust for burial being carried into execution.

It was stated at the Bar that the tablets of Wee Siang Tat had disappeared, but there was no evidence before me that the tablets of the ancestors of Wee Siang Tat had also disappeared. It may well be that they are being looked after by other members of the Seh 'Wee' and in such case there may be some one who is entitled to benefit under the further trust above set out.

Accordingly I find that the plaintiffs have not established to my satisfaction that the trusts have failed either entirely or in part.

There is however no provision as to what is to happen to the settled land after the death of the survivor of Wee Eng Cheng and Wee Eng Wan and 21 years thereafter. There will accordingly be a resulting trust after the expiration of this period. From the form of the Indenture it is clear that the property was never vested in the next-of-kin, but that the title remained in Ho Sok Choo Neo as administratrix. The resulting trust will, therefore, be in favour of Ho Sok Choo Neo, and will devolve on the present trustees of her will. They will, however, hold the land impressed with a trust in favour of the next-of-kin of Wee Siang Tat at his death.

There appears to be some doubt as to whether the settlors could have shown a title to the whole of the land comprised in the settlement, and there must be an inquiry on this point.

I will also direct an inquiry as to the whereabouts of the tablets of the ancestors of Wee Siang Tat and as to who is in charge of them.

Certain criticisms were directed against the solicitors for the trustees on the ground that he had filed unnecessary affidavits. I find however that he acted conscientiously in trying to put necessary facts before the Court, and his researches have been of considerable value. As I have indicated above, even after all his efforts there are still many essential facts about which the Court has not been properly informed.

Order accordingly.